



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/057,270	01/26/2002	George E. Fox	010AUS	3019
26830 7590 10/07/2010 RICHARD COALE WILLSON JR 3205 HARVEST MOON DR STE 200 PALM HARBOR, FL 34683-2127				
EXAMINER SIMS, JASON M				
ART UNIT		PAPER NUMBER		
1631				
MAIL DATE		DELIVERY MODE		
10/07/2010		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/057,270	Applicant(s) FOX ET AL.
Examiner JASON M. SIMS	Art Unit 1631

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 09 August 2010 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: The newly proposed amendments add limitations to a nucleic acid sequence database not previously examined, which would require a new search and consideration. Furthermore, the amendments broaden the scope to developing a bifurcating phylogenetic tree that establishes the genetic affinity between all the organisms or viruses, which would cause a new search and consideration. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 4-10, 19, 21, 23, 24, 28, 29 and 39-47.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Marjorie Moran/
Supervisory Patent Examiner, Art Unit 1631

/Jason Sims/

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments have been considered, but were not deemed persuasive as they address amended claims, which have not been entered. However, applicant argues, for example at pages 15-16, the differences between the prior art with respect to step (a) of claim 4. Applicant argues that the extracted sequences in the method of Ebersole are not used in a manner equivalent to the target sequences of the instant invention. Applicant's arguments would not be found persuasive as step (a) only requires that sequences are obtained from all organisms or viruses that will be incorporated into the determination. Ebersole et al. teach extracting sequences from a database, which represent all the major microorganism domains and are used in the determination steps of Ebersole et al. Applicant's arguments with respect to the amendments of claim 4, step (a) are not found persuasive as they address amended claims, which have not been entered. Applicant further argues with respect to claim 4, step (c) reasons for the optional step in the claimed method, which distinguish it over Ebersole et al. Applicant's arguments are not found persuasive as they address an optional step in the method and thus does not necessitate it being considered in the prior art method. Applicant further argues that method of Ebersole et al. for identifying useful signature sequences are distinct from the methods recited in applicant's claims, such that the recited claimed method teaches that sequences that are not perfect or even near perfect may still be useful for a group. Applicant argues that Ebersole's method requires unique or nearly unique subsequences, thus may overlook subsequences that are in fact quite specific to a grouping, but do not occur in a probably region for signature sequences. Applicant's arguments again address amended claim limitations not entered, thus have not been deemed persuasive. Again, the newly proposed amendments add limitations to a nucleic acid sequence database not previously examined, which would require a new search and consideration. Furthermore, the amendments broaden the scope to developing a bifurcating phylogenetic tree that establishes the genetic affinity between all the organisms or viruses, which would cause a new search and consideration. As such the proposed amendments have not been entered.